IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26597-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
DAVID IGNACIO GARCIA,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Sweeney, J. — This appeal follows a felony conviction for violation of a protection order. The trial judge refused to grant a mistrial despite the wife's apparent violation of an order in limine prohibiting any reference to the defendant's prior domestic violence. We see no abuse of discretion and affirm the conviction.

FACTS

David and Maaika Garcia started their relationship in New Mexico in 1999. They had a son, married, and, in 2003, moved to the Tri-Cities, Washington. The couple separated in 2005. David moved out of the family home. And Maaika petitioned for a protection order in May 2006. The court entered a two-year protection order on June 9,

2006.

Maaika and David reconciled for several weeks from the end of January 2007 until March 2007. David left the house on the afternoon of March 18. Maaika took their son to a park. Maaika returned to the house a couple of hours later and found a broken lock on the laundry room window and David inside the house. David and Maaika argued. David nearly pushed Maaika down the stairs to their basement. Their son was in the basement. David stopped pushing Maaika. She waited until he was elsewhere in the house and then took their son and her phone into a downstairs bathroom, locked the door, and called police.

Police responded. They found David asleep or unconscious on a couch upstairs. The police woke him up and arrested him.

The State charged David with felony violation of a post-conviction protection order. It alleged that David violated an existing protection order by assaulting Maaika. The State also alleged, as an aggravating circumstance, that David's violation occurred within sight or sound of David's young son.

A jury found David guilty of violating a protection order. The jury also returned special verdicts that David assaulted Maaika in violation of the protection order and that the assault occurred within sight or sound of their minor son.

DISCUSSION

Refusal to Grant a Mistrial

We review the trial judge's rulings on matters of evidence for abuse of discretion, including the court's refusal to grant a mistrial. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. West*, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

The trial judge ruled on a motion in limine that the State could not present limited evidence of David's "past history of drug abuse"; nor could the State present evidence of David's prior acts of domestic violence against Maaika. David assigns error to the court's refusal to grant a mistrial based on Maaika's testimony, which, he argues, violated this order.

Maaika interjected several statements that should have been excluded under the court's pretrial ruling. She said that he had become "violent again." Report of Proceedings (RP) (Oct. 17, 2007) at 9. She said that she thought that David was "passed out" rather than asleep. RP (Oct. 17, 2007) at 26. She referenced a conversation earlier in the day of the incident, stating that she had previously testified about that conversation when she had not. And she testified about their son hitting David on the leg and telling David to "stop being mean." RP (Oct. 17, 2007) at 31.

Maaika testified: "I intended to have [the protection order] removed at first then when he moved back in the thing he said he would do he started not to do them and he started to be violent again." RP (Oct. 17, 2007) at 9. The statement violated the order in

limine excluding evidence of David's prior acts of violence toward Maaika. Indeed, it prompted a comment from the trial judge that "[i]f [Maaika] says something about prior violence we may have to mistrial." RP (Oct. 17, 2007) at 10. Maaika's statement that David appeared to be "passed out" rather than asleep was a direct response to David's attorney's own question during cross-examination. RP (Oct. 17, 2007) at 26. And the other two statements to which David objects did not violate the order in limine. *See* RP (Oct. 17, 2007) at 27, 31.

David argues that Maaika's interjections of inadmissible testimony were intentional. However, "the judge should not consider whether the statement was deliberate or inadvertent." *State v. Weber*, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983).

Instead, the inquiry is whether the remarks prejudiced the jury and deprived the defendant of a fair trial. *Id.* at 165. The trial judge should consider three factors to determine whether a trial irregularity warrants a new trial: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark." *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). We presume that the jury followed the trial judge's instructions to disregard the remark. *Weber*, 99 Wn.2d at 166.

The decision is ultimately discretionary with the trial judge because the trial judge

is in the courtroom and, therefore, is in the best position to assess the effect of the testimony. *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008).

The State submitted a copy of the protection order without objection from David. The existence of the prior protection order is an element of the crime of felony violation of a protection order. RCW 26.50.110(1), (4); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 36.51.02 (2008). The jury then knew about the prior protection order. We agree with the trial judge, then, that the general reference to David acting violently in the past was not prejudicial or particularly noteworthy from the jurors' perspectives.

Moreover, David did not move for a mistrial following Maaika's remark. David moved to strike Maaika's "violent again" comment. RP (Oct. 17, 2007) at 9-10 (David's lawyer stating, before the jury, "Your honor, unbelievable objection," and then a moment later, at sidebar, "Motion to strike. If it comes up again I will make a motion to dismiss the charges."). David did not move for a mistrial until later in the trial. He first moved for a mistrial after the State asked one of the responding police officers whether David was awake or in an unconscious state when the officers arrived at the home. And he next moved for a mistrial with prejudice following the prosecutor's remarks about David's credibility during closing argument. The trial court's general jury instruction forbidding jurors from considering stricken evidence or evidence that was not admitted from the

record was adequate to avoid any prejudicial effect from Maaika's comment. *See* Clerk's Papers at 8. The court's decision to deny a mistrial was well within its discretion.

State's Closing Argument—Presumption of Innocence

The prosecutor argued: "Who do you think is the one person in this room . . . that has a personal interest in this case?" RP (Oct. 19, 2007) at 52. Mr. Garcia objected and moved for mistrial. The court overruled the objection and denied the motion. The prosecutor then continued: "As I was saying, who has a personal interest in this case? This man. Don't you think every single defendant can go up there and say, "'I didn't know about the order, Miss Petra'? [sic] He has an interest to not tell you the truth." RP (Oct. 19. 2007) at 53.

David argues that when the prosecutor improperly commented on David's credibility by suggesting he had a motive to lie, she thereby denied David his right to a presumption of innocence. We first determine whether David establishes that the State's remarks were, in fact, improper, and we next consider the remarks' prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice on the part of the prosecutor is established only where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *Id.* (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Prosecutors have significant latitude "to draw and express inferences and deductions from the evidence, including inferences as to the credibility of

witnesses." *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (1969) (prosecutor may remark that jury should consider a witness's interest in a case in evaluating the witness's credibility and that a person charged with a crime has a good motive to lie), *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971). Here, David testified as a witness. And, as the trial court observed, nothing prevented David's attorney from remarking in closing argument that other witnesses may also have had a motive to lie.

We conclude that the State's argument did not deny David his presumption of innocence.

Additional Grounds

David raises two additional grounds for review.

He argues that a juror was erroneously seated even though she had expressed during voir dire that, as a victim of spousal abuse herself, she was upset by the subject matter of this case. However, the report of proceedings does not include the voir dire. Where a claim of error involves matters outside of the record, the claim must be brought in a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

David next argues that the jury was presented with false and/or misleading information regarding whether Maaika was also charged with violating the protection

order. David recounts that his attorney mentioned in court that it was "interesting" that Maaika had not also been charged with violation of a protection order when she consented to David living with her. David contends that the judge responded that "that was not true." David later visited the clerk's office and found no record of a charge against Maaika. This line of argument has no merit. We cannot locate David's attorney's comments and the court's response in the record, and David provides no citations. Moreover, the questions of whether Maaika was also charged and whether she should have been charged are irrelevant to the elements of the crime with which David was charged and convicted. There is no error here.

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Schultheis, C.J.

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Korsmo, J.